

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON. D.C. 20460

August 12, 1994

**OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE**

SUBJECT: Enforcement Response Policy for Treatment of
Information Obtained Through Clean Air Act Section 507
Small Business Assistance Programs

FROM: Steven A. Herman
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TO: Assistant Administrators
General Counsel
Regional Administrators
Deputy Regional Administrators
Regional Counsel

This memorandum sets forth the Agency's enforcement response policy on the treatment of violations detected during compliance assistance provided under state small business assistance programs (SBAPs) required under Section 507 of the Clean Air Act (CAA).¹ This policy responds to state and regional requests for guidance as to what incentives are appropriate to encourage small businesses to seek SBAP assistance. It will allow EPA regions to determine whether SBAPs are administered so as to ensure that states have the enforcement authority necessary for approval of their state implementation plans (SIPs).

The policy applies to information obtained by state agencies administering Section 507 SBAPs, including agencies that also manage permitting and enforcement programs. The policy sets forth two general options designed to encourage small business participation in SBAPs. In summary, this policy updates and amends earlier EPA Section 507 guidance and endorses state SBAPs that either (1) give small businesses that voluntarily seek compliance assistance a limited period to correct violations observed or revealed as a result of compliance assistance or, (2) if the SBAP is independent of the delegated state air enforcement program, keep confidential information that identifies the names and locations of specific small businesses with violations revealed through compliance assistance. These two options are set forth in detail below.

¹ For present purposes, this policy applies only to violations of the Clean Air Act that are detected through SBAP compliance assistance. The Agency will clarify the application of this policy to violations in other media as soon as is practicable.

In developing these alternatives, EPA balanced three primary considerations. First, the Agency is seeking to provide the states with ample opportunity to adopt innovative approaches to compliance within federal guidelines. Thus, the policy options set forth below should be regarded as outer limits, within which states have flexibility to tailor SBAPs suited to state needs. For example, states that exercise enforcement discretion on a case-by-case basis to determine the appropriate response to violations detected through SBAP compliance assistance meet the general criteria set forth in this policy. In addition, EPA's "Guidelines for Implementation of Section 507 of the 1990 Amendments" specifically encourage SBAPs to leverage the efforts of existing technical assistance providers, which have had a long-standing practice of offering their services confidentially to industry. Thus, this policy preserves the states' option to continue to maintain confidentiality in their SBAPs.

Second, EPA recognizes that participation in SBAPs is typically voluntary. Assistance is provided only upon request, and therefore the programs will succeed in promoting compliance only if assistance services are sought on a widespread basis. Thus, the Agency is seeking to give the states the ability to provide incentives that will encourage small businesses to participate in SBAPs.

Third, the CAA requires the state to have authority to take appropriate enforcement action with respect to CAA violations. Thus, EPA has an obligation to ensure that state SBAPs are structured so as to maintain an appropriate level of enforcement authority within delegated state programs. The Agency believes the options set forth in this policy will allow states sufficient latitude to use an appropriate combination of delegated state enforcement authority and compliance assistance activity to improve compliance in the small business community.

Correction period option

This policy option allows states to give small businesses up to 90 days either to correct, or to take substantial steps to correct (e.g. apply for necessary permits, secure financing, order equipment) violations discovered during compliance assistance. For violations that cannot be corrected within 90 days of detection, the correction period may be extended up to an additional 90 days in a written agreement that establishes a compliance schedule.²

To ensure that SBAPs do not provide an

² Obviously, states may not offer a correction period for violations of CAA provisions for which EPA has not delegated enforcement authority to the state.

unintended shield, the following conditions must apply:

1. During the correction period, the state may commit to forego all enforcement responses, including notices of violation (NOVs) and civil penalties, for violations that are observed by or revealed to the state as a result of compliance assistance provided in accordance with this policy. However, the state shall not agree to forego during the correction period 1) criminal actions, 2) actions to enjoin imminent and substantial endangerment to human health or the environment or 3) actions to address recurrences of violations for which a prior enforcement response had been taken. The correction period shall be sufficient for the source to correct, or to take substantial steps to correct (e.g. apply for necessary permits, secure financing, order equipment) the violation, but is not to exceed 90 days following detection. For violations that cannot be corrected within 90 days, states may extend the correction period for an additional period not to exceed 90 days, so long as the state enters into a written agreement with the source that sets forth the additional correction period and any additional steps to be undertaken by the source to achieve compliance. The requirements of the correction period should be made clear to the source prior to offering compliance assistance.
2. Although the state may agree, except as provided in paragraph (1) above, that no enforcement action will be taken for violations that are revealed or observed through compliance assistance and corrected within the correction period, the state shall not give guarantees that the information obtained or revealed through compliance assistance will be kept confidential. However, this policy option does not require SBAPs to provide to EPA information that identifies the names or locations of specific businesses that are found to be in violation through compliance assistance. In general, EPA will look to SBAPs primarily for information that shows whether SBAPs are successful in promoting compliance or that generally identifies business sectors with chronic compliance problems. Further, this policy does not affect existing Agency policy or regulations regarding treatment of confidential business information.
3. Violations detected through state enforcement inspections shall remain fully enforceable by the state, unless the violation was also previously observed or revealed through voluntary compliance assistance and the source has made a commitment to come into compliance during a correction period. States must reserve their discretion to conduct scheduled enforcement inspections at all times, including during the correction period.

4. Upon expiration of the correction period, the small business shall be subject to all applicable enforcement response policies (which may include discretion whether or not to take formal enforcement action) with respect to all violations that had been revealed through compliance assistance and were not corrected within the correction period.³ The penalty in any such action may be calculated to include the correction period. This policy does not limit the states' discretion to use information on violations observed or revealed through compliance assistance as evidence in subsequent enforcement actions, for example to show prior or repeated violations.
5. The state's actions in providing compliance assistance shall not be a legal defense in any enforcement action. However, a source's good faith efforts to correct violations detected during compliance assistance may be considered as a mitigating factor in determining an appropriate enforcement response or penalty in subsequent enforcement actions.
6. Section 507 makes clear that SBAPs are intended primarily to benefit small businesses that do not have the technical or financial capabilities to meet environmental requirements without SBAP assistance. Thus, SBAPs shall state explicitly that the program is subject to the eligibility requirements set forth in Section 507(c). These requirements include the requirement that only sources that are non-major for all air programs are eligible, except as provided under Section 507(c)(2). Small businesses excluded by states or the Administrator under Section 507(c)(3)(A) or (B) shall be ineligible for application of this policy option. In addition, if a source is already the subject of a pending NOV or enforcement action, the correction period option cannot be applied to the violations involved in the enforcement action. Moreover, the states should retain their discretion to deny compliance-assistance on a case-by-case basis, for example if a facility is already scheduled for an enforcement inspection or has a history of noncompliance. For sources that are ineligible for SBAP assistance, and therefore this policy option, the applicable enforcement response policies (which may include discretion as to whether or not to take enforcement action) apply.
7. Small businesses shall be eligible only once for an on-site

³ This policy does not require, or even propose, that state SBAPs, as opposed to separate agencies or offices, have regulatory enforcement authority. Moreover, this policy gives SBAPs considerable flexibility as to how to interact with state regulatory enforcement programs under the correction period option.

compliance audit or similar on-site assistance resulting in a correction period as described above, unless a request is made for such an audit or assistance in order to comply with requirements that did not exist when prior compliance assistance was requested and provided. For on-site compliance assistance provided in response to a second or subsequent request, correction periods shall be granted only for violations of new requirements.

8. State following this policy shall include and implement plans for conducting follow-up inspections or audits, or other activities sufficient to verify and track compliance.

Under this option, exposing uncorrected violations to the possibility of an enforcement response, including penalty assessment, after the correction period has expired is essential if we are to make substantial gains in compliance through these small business assistance programs.

This policy option has several important advantages over other options we have considered. First, it offers certainty, in that a small business requesting and receiving compliance assistance will know that no state enforcement will result for violations that are identified and corrected within the correction period'. We expect this degree of certainty to ensure greater participation in SBAPs, especially if SBAPs give official recognition to businesses that have participated successfully in SBAPs. Second, the policy will allow greater openness between SBAPs and specific facilities, the small business community in general, and other state officials. It will promote the sharing of information on pollution prevention measures, cost effective means of compliance and other valuable compliance-related activities with and among the regulated community. In addition, the policy will make it easier for states to use facility-wide or industry-wide information obtained through compliance assistance programs to address chronic violations with an appropriate balance of targeted compliance assistance and enforcement strategies.

Confidentiality option

This policy option applies only to SBAPs that are operated strictly independently from the state's delegated regulatory enforcement program. The requirement for independence is met if either (1) the SBAP is not operated out of the state air pollution control agency (as defined in CAA Section 302) or (2) a regulation, official policy, memorandum of understanding or other official document establishes independence between the SBAP and the enforcement program. Under this option, SBAPs may keep

confidential ⁴ information regarding violations detected through SBAP compliance assistance, including the names and locations of the small businesses. However, to ensure that deterrence continues to operate as an incentive to participation in SBAPs, the following conditions apply to this option:

1. Although SBAPs choosing this option may keep confidential information that identifies specific small businesses as having violations, the SBAP shall make general statistical and other information regarding violations detected through compliance assistance available to the state regulatory enforcement program. This information should be sufficient to assist the enforcement program in developing targeted enforcement strategies, as well as to complement compliance assistance activities.
2. State regulatory enforcement programs in states selecting this option shall retain their full discretion to take enforcement action against small businesses who receive SBAP assistance. However, the enforcement program may consider good faith efforts to achieve compliance through participation in the SBAP in determining the appropriate enforcement response in specific cases.
3. Conditions 5, 6, and 8 applicable to the correction period option apply also to the confidentiality option.

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These policy options do not limit EPA's or citizen existing authority to conduct inspections or take enforcement action. However, EPA is committed to helping SBAPs succeed. Thus, in taking enforcement action against a specific source, EPA will not routinely seek information obtained from or revealed by the source during on-site compliance assistance provided by state SBAPs. In addition, EPA will give considerable weight to a source's participation in a SBAP and good faith commitment to achieving compliance in determining an appropriate enforcement response. In general, many of the small businesses who will be eligible for SBAP compliance assistance are rarely or never subject to federal inspections for provisions of the CAA for which the state has received a delegation, and therefore EPA does not expect much overlap between federal enforcement programs and SBAPs. Indeed, EPA expects that by working in accordance with this policy, SBAPs will increase compliance in the small business

⁴ State freedom of information laws may place limits on the degree of confidentiality that can be given to information. This policy option is intended primarily to allow states to keep information known to the SBAP confidential from the state enforcement program.

community without affecting the exposure of small businesses to federal enforcement.

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